

1 Hearing is Set For:  
2 April 5, 2019  
Time: 9:00 AM  
3 Judge: Hon. James Dixon  
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8 **SUPERIOR COURT OF WASHINGTON**  
9 **FOR THURSTON COUNTY**

10 STATE OF WASHINGTON,

No. 17-2-01546-34

11 Plaintiff,

12 vs.

13 TIM EYMAN, et al.,

MOTION TO FILE AMICUS BRIEF ON  
BEHALF OF INSTITUTE FOR FREE  
SPEECH AND MOTION TO SHORTEN  
TIME

14 Defendant.

15 **I. RELIEF REQUESTED**

16 COMES NOW, The Institute for Free Speech ("Institute"), by and through its Attorney  
17 of Record, The Law Office of Nicholas Power, and respectfully requests pursuant to CR 7(b)  
18 that this honorable court grant leave to file the Institute's Appended Brief and allow the  
19 Institute to advise the court on the novel First Amendment issues presented in this matter.  
20 Furthermore, as no prejudice would result from hearing this motion and the arguments  
21 contained in the attached brief on a shortened schedule, the Institute further requests that its  
22 Motion to Shorten Time be granted and that it be allowed to address the Court during the  
23

1 hearing on Mr. Eyman's Motion for Partial Summary Judgment now set for April 5 at 9:00  
2 AM.

## 3 II. APPLICABLE LAW

4 It is within the discretion of the Court to allow amicus participation if it may be  
5 helpful to the Court. *Parsons v. Dep't of Soc. & Health Servs.*, 118 P.3d 930, 934 (Div. I,  
6 2005) (explaining, "[n]o specific rule permits amicus participation in the trial court, but  
7 neither is there any rule prohibiting it. We can see no reason a trial judge should not have  
8 discretion to permit such participation if it may be helpful to the court.")

## 9 III. STATEMENT OF FACTS

10 The Institute was founded in 2005 as a nonprofit then named the Center for  
11 Competitive Politics. Its core mission is to promote and defend the political rights to free  
12 speech, press, assembly, and petition guaranteed by the First Amendment. The Institute is a  
13 nationally recognized advocate for free speech issues and works with government officials to  
14 craft laws that expand free political speech rights consistent with the Constitution. In  
15 addition, the Institute actively educates the public, legislators, organizations, and the media to  
16 enable every American to understand the importance of the First Amendment's political  
17 speech freedoms.

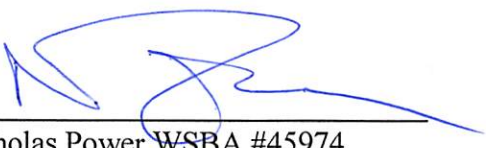
18 The Institute has a history of filing amicus briefs on First Amendment matters in state  
19 and federal courts. The Institute wishes to advise the Court with its view as to the illegality of  
20 the State's proposed remedy in this matter and offer its views on how such a remedy, if  
21 implemented would erode the core principles of free speech and political participation.  
22  
23

1 Accordingly, The Institute prays for leave to file the Brief Attached as Appendix A to  
2 this Motion and to be granted leave to present its argument during oral arguments during the  
3 hearing noted for April 5, 2019 at 9:00 AM.

4  
5 DATED this 29<sup>th</sup> Day of March 2019.

6 THE LAW OFFICE OF NICHOLAS POWER

7  
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## Appendix A

☐ No Hearing Set

☒ Hearing is Set

Date: Friday, April 5, 2019

Time: 9:00 a.m.

Judge James J. Dixon

STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON

*Plaintiff,*

v.

TIM EYMAN, et al.,

*Defendant.*

Case No. 17-2-01546-34

*AMICUS CURIAE* BRIEF OF  
THE INSTITUTE FOR FREE SPEECH  
IN SUPPORT OF DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

INTEREST OF *AMICUS CURIAE*

Founded in 2005, the Institute for Free Speech is a nonpartisan, nonprofit organization that works to protect and defend the rights to free speech, assembly, press, and petition. Mr. Eyman's case, in which he is unrepresented by counsel, presents a novel question of First Amendment law: whether the right to financially manage a political organization may be permanently revoked by the State based upon its assessment of a person's trustworthiness.

INTRODUCTION

"There is no right more basic in our democracy than the right to participate in electing our political leaders," *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191, a right that extends to political participation "[i]n the ballot initiative context." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010).<sup>1</sup> Accordingly, "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

Nevertheless, the State of Washington ("State") persists in demanding an injunction "aimed at preventing" a single citizen, Mr. Timothy Eyman, "from managing, controlling, negotiating, or directing financial transactions" for political committees ("PACs"). State Br. at 20 (quotation marks omitted). This is no temporary measure; it would apply until Mr. Eyman slips the surly bonds of earth.

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<sup>1</sup> Indeed, "far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for 'the widest possible dissemination of information from diverse and antagonistic sources.'" *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 n.29 (1978) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

1 The State's brief spends significant time cataloging Mr. Eyman's alleged misdeeds. But  
2 when it comes to marshalling a legal justification for this radical demand, it protests that Mr.  
3 Eyman has not "show[n] that the conduct in question is constitutionally protected." State Br. at 20.  
4 However, "the conduct in question" is unquestionably "constitutionally protected." *Id.* In fact, the  
5 State insists on nothing short of a prior restraint on protected First Amendment activity, a demand  
6 subject to strict scrutiny. And the State cannot possibly meet that standard because a less restrictive  
7 path—the millions of dollars in threatened fines that have already ruined Mr. Eyman financially  
8 and deprived him of counsel in this case—is available to the State and adequate to its purposes.

#### 10 ARGUMENT

11 A PAC is "any person (except a candidate or an individual dealing with his or her own  
12 funds or property) having the expectation of receiving contributions or making expenditures in  
13 support of, or opposition to, any candidate or any ballot proposition." RCW § 42.17A.005. This  
14 closely follows federal law, which also defines a PAC in terms of its spending. 52 U.S.C. §  
15 30101(4) ("any committee, club, association, or other group of persons which receives  
16 contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures  
17 aggregating in excess of \$1,000 during a calendar year"). As a threshold matter, then, the State is  
18 quite wrong to suggest that barring Mr. Eyman "from management of *financial transactions* of  
19 any kind for any political committee" is a "limited request." State Br. at 1 (emphasis in original,  
20 citation and internal quotation marks omitted). As a matter of statutory definition, a PAC *is* its  
21 financial transactions.

22 PACs are unquestionably protected by the First Amendment. *Fed. Election Comm'n v.*  
23 *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) ("We also reject the notion  
24 that the PACs' form of organization or method of solicitation diminishes their entitlement to First  
25 Amendment protection.")

1 Amendment protection”).<sup>2</sup> The First Amendment protects both “lone pamphleteers or street corner  
2 orators in the Tom Paine mold” and “PACs...th[at] spend substantial amounts of money in order  
3 to communicate their political ideas through sophisticated media advertisements.” *Id.* at 493. “A  
4 tendency to demonstrate distrust of PACs is not sufficient” to curtail their First Amendment rights.  
5 *Id.* at 499.

6  
7 Moreover, this protection is not limited to the legal entity of the PAC itself. Its constituent  
8 parts, very much including its human actors, are also secure in their First Amendment rights.  
9 “There is *no question* that participation in campaigns is a protected activity” under the federal  
10 Constitution. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (emphasis supplied).  
11 The State has offered no authority whatsoever for its suggestion that the First Amendment right to  
12 “participate in campaigns” does not apply to campaign treasurers or those otherwise charged with  
13 the management of a PAC’s finances. Indeed, control of a PAC’s finances is indispensable to a  
14 committee’s existence, predicated as it is upon “receiving contributions or making expenditures.”  
15 RCW § 42.17A.005.  
16

17  
18 Of course, it is what this money is used *for* that implicates the First Amendment. As the  
19 U.S. Supreme Court explained in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the High  
20 Court’s “seminal campaign finance case,” *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*,  
21 564 U.S. 721, 757 (2011) (Kagan, J., dissenting), “virtually every means of communicating ideas  
22 in today’s mass society requires the expenditure of money.” *Buckley*, 424 U.S. at 19. And “the  
23 transformation of contributions into political debate involves speech by someone other than the  
24 contributor.” *Id.* at 21. PACs, which have no mouth and cannot speak, must do so through the  
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27 <sup>2</sup> The Fourteenth Amendment applies the protections of the First Amendment against the State.  
28 *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925); *De Jonge v. Or.*, 299 U.S. 353, 364 (1937); *NAACP v.*  
*Ala.*, 357 U.S. 449, 466 (1958).



1 expenditure of money—the type of actions that must be handled by a treasurer or a similar figure.<sup>3</sup>

2 “We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about  
3 wholesale restriction of clearly protected conduct.” *Nat’l Conservative Political Action Comm.*,  
4 470 U.S. at 501. The State seeks to bar Mr. Eyman from involvement in that essential,  
5 constitutionally-protected process. Forever.

6  
7 In denying Mr. Eyman this right, the State will inevitably alter the form and flow of debate  
8 in Washington. Perhaps many would welcome that result. But that is the not the result required by  
9 our Constitution. Rather, “[t]he inherent worth of the speech in terms of its capacity for informing  
10 the public does not depend upon the identity of its source, whether corporation, association, union,  
11 or individual.” *Bellotti*, 435 U.S. at 777. This is true for the rights of those managers that control  
12 the PAC’s message or finances. If Mr. Eyman is to be a PAC treasurer or otherwise handle the  
13 finances of such a committee, Washington State is well within its rights to make that fact known  
14 to the public. *Brumsickle*, 624 F.3d at 994. The public is free to “consider, in making their  
15 judgment[s], the source and credibility of the advocate.” *Id.* (quoting *Bellotti*, 435 U.S. at 791-  
16 792). And the State may punish Mr. Eyman, with ruinous fines or, potentially, criminal penalties,  
17 if he violates the law. RCW § 42.17A.750-755. “[B]ut it may not suppress” Mr. Eyman’s right  
18 to participate as a financial manager “altogether.” *Id.* (quoting *Citizens United v. Fed. Election*  
19 *Comm’n*, 558 U.S. 310, 319 (2010)).

20  
21  
22 Given Mr. Eyman’s admitted and alleged conduct, there may be a temptation to forget that  
23 the State is seeking an unprecedented penalty rife with these constitutional concerns. After all, the  
24 Securities and Exchange Commission imposes lifetime bans on certain types of trading, and  
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28 <sup>3</sup> Money locked away from a PAC’s financial manager or treasurer cannot be converted into that  
PAC’s protected speech, nor support the protected association of its contributors and staff.

1 attorneys are subject to disbarment. But “[i]n considering this question...we must never forget,  
2 that it is a constitution we are expounding.” *McCulloch v. Md.*, 17 U.S. 316, 408 (1819). And that  
3 Constitution teaches that “[t]he loss of First Amendment freedoms,” such as the State threatens  
4 here, “for even *minimal periods of time*, unquestionably constitutes irreparable injury.” *Elrod v.*  
5 *Burns*, 427 U.S. 347, 373 (1976) (Brennan, J., plurality op.) (emphasis supplied). The ability to  
6 participate effectively in political campaigns, which includes the right to organize and manage  
7 PACs, is not comparable to the purely economic regulations the State relies upon. State Br. at 19.

9 To the contrary, the *entire point* of the Constitution’s ban on prior restraints is to prevent  
10 the Government from barring protected activity “predicated upon surmise or conjecture that  
11 untoward consequences may result.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 725-726  
12 (1971) (Brennan, J., concurring). But that is just what the State does here. Rather than waiting  
13 for future violations and seeking appropriate—and properly tailored—penalties, it would strip  
14 Mr. Eyman of his rights because he “cannot be trusted.” State Br. at 19.

16 As that statement shows, the remedy the State seeks here is inherently dangerous. It asks  
17 this Court to be the very first, to anyone’s knowledge, to impose an injunction of this nature, and  
18 to do so in a *pro se* case. See *Voisine v. United States*, 579 U.S. \_\_; 136 S. Ct. 2272, 2291 (2016)  
19 (Thomas, J., dissenting) (“We treat no other constitutional right so cavalierly. At oral argument  
20 the Government could not identify any other fundamental constitutional right that a person could  
21 lose forever by a single conviction for an infraction punishable only by a fine”). That decision will  
22 then be precedent to be applied in very different circumstances and—given the State’s ability to  
23 threaten crippling fines in the millions of dollars, as it has done here—the temptation to settlement  
24 in those future cases will be intense. Therefore, it may be that this question will not be litigated  
25 again for some time. Out of view of the courts, the incentives to viewpoint discrimination may  
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1 prove too tempting for some. Those who succumb may even do so unconsciously; the State's  
2 decision as to who can be "trusted" is necessarily and inherently subjective, and it is only human  
3 nature to trust allies and distrust rivals.

4 Thankfully, all of this can be avoided. Washington law gives the State adequate tools for  
5 deterring future violations without setting us down this path. It need not invent new ones.  
6

7 CONCLUSION

8 Mr. Eyman's motion for partial summary judgment ought to be granted.

9 Dated: March 29, 2019

Respectfully submitted,

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11 

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3/29/2019